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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOANNA COOK,

Plaintiff and Appellant,

v.

PEDRAM SHIRZAD et al.,

Defendants and Respondents.

B239437

(Los Angeles County  
Super. Ct. No. SC101666)

APPEAL from an order of the Superior Court of Los Angeles County. Norman P. Tarle, Judge. Affirmed in part and reversed and remanded in part with directions to recalculate damages.

Leslie S McAfee, for Plaintiff and Appellant.

Law Office of Herb Fox, Herb Fox; Kousha Berokim for Defendant and Respondent Pedram Shirzad.

Baranov & Wittenberg, Michael M. Baranov for Defendant and Respondent Semira Shirzad.

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In 2003, plaintiff Joanna Cook and defendants Pedram and Semira Shirzad formed an oral partnership for joint ownership of a multi-unit rental property, intending thereby to defraud a lender by concealing Cook's interest in the property and capitalizing on Pedram's good credit. In 2008, the Shirzads secretly sold the property, which had appreciated considerably, and refused to pay Cook any of the proceeds. After a court trial, Cook prevailed on causes of action for breach of fiduciary duty and constructive fraud, but the court found she and the Shirzads had conspired to defraud the lender. Applying the unclean hands doctrine, the court calculated Cook's interest in the property as of the time it was transferred to the partnership in 2003, not the date it was sold in 2008, thereby denying her any share of the appreciation.

On appeal, Cook contends the unclean hands doctrine should not apply because the Shirzads were equally if not more at fault than she. We agree damages were improperly calculated, and therefore vacate the damages award and instruct the trial court to recalculate damages.

### **Background**

In 1999, Cook, Semira Shirzad, and nonparty Thomas Dunn each invested \$12,500 to purchase a multi-unit residential property, with Semira acting as the broker in the purchase. Title to the property and the mortgage were held exclusively in Cook's name, and she moved into one of the units and took on management of the property by collecting rents, paying bills, and seeing to repairs. Beginning in 2001, Cook had difficulty keeping up with her share of the mortgage payments and monetary contributions for maintenance, but Semira and Dunn made up the difference.

Sometime around 2003, Dunn sold his one-third interest in the property to Semira. Although at trial he could not recall the exact amount, he testified he transferred his interest for either \$75,000 or \$80,000.

Soon thereafter, in 2003, Cook and Semira transferred title to Pedram Shirzad, Semira's brother, in order to conceal the property from Cook's creditor and refinance it in Pedram's name, as Cook's credit rating was not amenable to obtaining favorable loan

terms. The transfer was in name only, and Cook and Semira each retained their respective one-third and two-thirds interests in the property notwithstanding its title averments.

In 2007, Cook discovered that Pedram and Semira had encumbranced the property to secure several loans amounting to hundreds of thousands of dollars. She received none of the proceeds from these loans. Then, the Shirzads transferred the property to a Shirzad family trust and in 2008 sold it to a third party for \$1,318,000, keeping the net proceeds.

Cook sued for breach of fiduciary duty and sought imposition of a constructive trust.

After a court trial, the court issued a statement of decision in which it found Semira committed constructive fraud and breached her fiduciary duty to Cook by participating in Cook's removal from the title and then treating the property as her own, as evidenced by her encumbrancing it, transferring it to her family trust, and ultimately selling it and failing to distribute any of the proceeds to Cook. The court found Pedram, though not a partner, became a fiduciary when the property was transferred to him in 2003. He, too, committed constructive fraud and breached his fiduciary duty by engaging in self-dealing, as evidenced by his taking out loans on the property, transferring it to his family trust, and selling it to a third party, with no proceeds going to Cook.

The trial court found the 2003 transfer from Cook to Pedram was part of a "conspiracy to perpetrate a fraud on an innocent party," i.e., a lender. (No specific lender is identified in the record.) The court found the conduct to be unconscionable, and stated "the power of the court ought not to be used to reward such behavior." Regarding the equities of the situation, the court found that Cook received free rent for a period of months, but also provided a benefit to the Shirzads by collecting rents and acting as a property manager. The court found the Shirzads benefitted additionally from the use of loans they were not entitled to receive. Although there had been some testimony that encumbrances on the property at the time it was sold resulted in only \$345,901 of the \$1.318 million sale price being disbursed to the Shirzad trust in 2008 or thereafter,

objections to that testimony were sustained, and the evidence was stricken. In its statement of decision the court made no reference to any encumbrances.

Applying the doctrine of unclean hands, the court valued Cook's interest in the property as one-third of its value in 2003, when she transferred it to Pedram. The court noted that although defendants listed unclean hands as a defense in their answer, they "failed to assert or argue the doctrine." The court went on to state this was "not surprising since it would have required the admission that all parties, including the defendants, had been complicit in perpetrating a fraud. The fraud in this instance was on the lending institution from whom the parties were seeking the refinancing. Plaintiff was taken off of the deed of trust because of her bad credit. Pedram Shirzad was placed on the deed of trust as the sole owner, although he had no partnership interest in the property and according to plaintiff was only a straw man in the business arrangement. Furthermore, no documents were prepared that would have alerted a lender of the true partnership agreement. This was a scheme to purposely mislead a lender. This court ought to have no part in giving its imprimatur to such a project."

The court set the value of Cook's one-third interest at \$77,500, arriving at the number by considering Dunn's testimony regarding the amount he received for his one-third share around 2003—either \$75,000 or \$80,000—and taking the midpoint.

### **DISCUSSION**

The trial court found that in 2003, Cook and the Shirzads formed a partnership for ownership of an apartment complex that at the time was owned one-third by Cook and two-thirds by Semira. When originally purchased by Cook, Dunn and Semira in 1999, the property was worth \$37,500, but by 2003 it had appreciated to \$232,500, and in 2008 it sold for \$1.318 million. The court found Pedram, in whose sole name title resided, acquired the property constructively in trust for Cook, who continued to own a one-third interest. The court awarded Cook the value of that one-third interest as of 2003, when the partnership was formed.

Cook attacks the adequacy of the damage award on the ground that the trial court improperly applied the unclean hands doctrine to calculate the value of her one-third interest in the partnership property as of 2003, not 2008. We agree.

**A. Waiver**

Defendants preliminarily argue the appeal should be dismissed because Cook failed to move for a new trial before claiming damages were inadequate. We disagree. It is true that failure to move for a new trial would ordinarily preclude a prevailing plaintiff from complaining on appeal that the damages awarded were inadequate, as “the trial court is vested with the power, denied to us, to weigh the evidence and resolve issues of credibility. [Citation.] When defendants first challenge the damage award on appeal, without a motion for a new trial, they unnecessarily burden the appellate courts with issues which can and should be resolved at the trial level.” (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.) But failure to move for a new trial does not preclude appellate review of a legal error, even if the error purportedly resulted in an improper reduction of damages. (*Mendoyoma, Inc. v. County of Mendocino* (1970) 8 Cal.App.3d 873, 878.) Because Cook failed to move for a new trial, she may attack the adequacy of the damages award, but only insofar as the trial committed an error of law in ascertaining the amount of damages.

Cook nevertheless attempts to raise a number of factual arguments. For example, she repeatedly argues the purported fraud on a third party lender in this case was illusory because Pedram was a creditworthy applicant who “held full and complete title” to the property at issue.<sup>1</sup> And she argues her culpability was at any rate minimal because she took no part in seeking any loan, had no idea what representations defendants made to any lender, and merely complied with defendants’ requests. These arguments raise a factual dispute concerning the parties’ respective culpability, a dispute Cook has waived by failing to bring a motion for new trial.

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<sup>1</sup> Cook appears unaware of the irony of arguing in what is essentially a title contest that the defendant possessed good title.

But Cook also argues the trial court's application of the unclean hands doctrine to limit her recovery is inexplicable in light of its finding that defendants and she were all equally culpable. This argument involves application of law to undisputed facts, which is reviewable even absent a motion for new trial.

## **B. Constructive Trust**

On appeal the parties do not dispute that the trial court found Cook and the Shirzads formed a partnership for ownership of real property, the Shirzads breached their fiduciary duties to Cook, and although Pedram acquired sole title to the property in 2003, he held Cook's one-third interest constructively in trust. The court therefore awarded Cook money damages equal to the value of her one-third interest. These findings and the orderly result are well in accord with the law of constructive trusts, which provides that "[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." (Civ. Code, § 2224.) "A constructive trust is an equitable remedy imposed where the defendant holds title or some interest in certain property which it is inequitable for him to enjoy as against the plaintiff." (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 373.) "[W]here the constructive trustee has dissipated the fund that would constitute the res of the constructive trust is it proper to award a judgment for money damages." (*Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 134.)

But the trial court erred when it effectively froze Cook's interest in the partnership's sole asset as of 2003, when the partnership was formed, and denied recovery of a share of the asset's appreciation. This is directly contrary to established trust law, which holds that a "constructive trust . . . includes 'the direct product,' i.e., profit on and enhancement in value of the property traced into the trust. [Citation.]" (*Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.* (1978) 78 Cal.App.3d 371, 375; see *Heckmann v. Ahmanson*, *supra*, 168 Cal.App.3d at p. 135 ["under a

constructive trust upon money, the plaintiff is entitled to trace the fund to its ultimate product or profit”]; *Gladstone v. Hillel* (1988) 203 Cal.App.3d 977, 989 [“The constructive trust includes the product of the misappropriated property”]; *Coppinger v. Superior Court* (1982) 134 Cal.App.3d 883, 891 [“the trust extends to property acquired in exchange for that wrongfully taken”]; Rest. 1st of Restitution, § 197 [“Where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary”]; Rest. 1st of Restitution, §§ 160, com. d, & 202.) This is so because “[t]he purpose of the constructive trust remedy is to prevent unjust enrichment and to prevent a person from taking advantage of his own wrong,” and to permit an involuntary trustee to retain profits realized from his wrongdoing would reward rather than punish him for his wrongdoing. (*Heckmann v. Ahmanson, supra*, at p. 135.)

The trial court applied the doctrine of unclean hands to circumvent established trust law and freeze Cook’s interest in the partnership’s sole asset at its 2003 value. This was improper.

### **C. Unclean Hands**

“The ‘unclean hands’ doctrine is often invoked but rarely applicable.” (*Estates of Collins & Flowers* (2012) 205 Cal.App.4th 1238, 1241.) The doctrine rests on the maxim that “‘he who comes into equity must come with clean hands.’” This “is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be ‘the abettor of iniquity.’ [Citation.]” (*Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.* (1945) 324 U.S. 806, 814-815.)

“The defense of unclean hands does not apply in every instance where the plaintiff has committed some misconduct in connection with the matter in controversy, but applies

only where it would be inequitable to grant the plaintiff *any* relief. [Citations.] The court must consider both the degree of harm caused by the plaintiff's misconduct and the extent of the plaintiff's alleged damages. [Citation.] Whether the defense applies in particular circumstances depends on the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries. [Citation.] The decision of whether to apply the defense based on the facts is a matter within the trial court's discretion. [Citation.]" (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446-447.) But "[a] court's discretion to grant an equitable defense such as unclean hands is not unlimited. The court must consider the material facts affecting the equities between the parties; the failure to do so is an abuse of discretion. . . . A decision based on bare 'equity' unsupported by established precedent and lacking evidentiary support does not disclose the proper exercise of discretion." (*Id.* at p. 447, citation omitted.)

The doctrine of unclean hands cannot in logic limit a plaintiff's recovery where the court also imposes a constructive trust on property obtained from the plaintiff by the defendant, effectively finding the plaintiff was a victim with unclean hands. A constructive trust exists only if the property was wrongfully acquired by a person not entitled to its possession from a person who was entitled to possession. Here, the court found Cook was at the same time both a victim, in that her property was taken, and not a victim, in that she acceded to her property being taken. She cannot be both.

It does not matter that the trial court found Cook participated in conspiracy to defraud a lender, because it also found she participated in that conspiracy *with defendants*. Yet in purporting to limit her recovery on the ground that she should not be rewarded for her misdeeds, the court at the same time, and in equal measure, rewarded defendants for theirs. But "one cannot lay a trap for another, secure his confidence, induce him to make a conveyance of his property in expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that the donor too readily yielded to temptation to save himself at the possible expense of his creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of



whom advantage is taken. Though a deed made for an improper purpose is unfairly procured through the undue influence of the grantee, in violation of a fiduciary relationship, abuse of confidence, oppression or fraud, a court of equity will still grant relief to one in fault. Such relief will not be denied to a party least in fault against one who has led him into the act by a violation of confidence. They are not in equal wrong.” (*Birney v. Birney* (1933) 217 Cal. 353, 359; see also *Watson v. Poore* (1941) 18 Cal.2d 302, 312-313; *Warren v. Merrill* (2006) 143 Cal.App.4th 96, 115.)

“The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the Latin phrase ‘*in pari delicto*’ that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.” (*Norwood v. Judd* (1949) 93 Cal.App.2d 276, 288-289.)

At any rate, the unclean hands doctrine normally applies to conduct between the litigants themselves, not to conduct of a litigant towards a nonparty. (*Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1263.) And at a minimum the party invoking the doctrine must demonstrate he or she suffered some prejudice as a result of the other’s alleged wrongdoing. (*Soon v. Beckman* (1965) 234 Cal.App.2d 33, 36.) Here, nothing in the record demonstrated defendants suffered any prejudice as a result of Cook’s agreement, with them, to defraud a third party lender. And no evidence suggests that lender was injured either.

Therefore, the trial court erred in applying the unclean hands doctrine to limit Cook's recovery. That is not to say the court may not limit Cook's recovery on some other basis, a matter the court may address on remand when it recalculates her damages.

### **DISPOSITION**

We affirm the judgment to the extent it found defendants liable and instituted a constructive trust in favor of plaintiff. Defendants' motion for sanctions is therefore denied. We remand the matter for recalculation of plaintiff's damages.

Plaintiff is to recover her costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.